

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

Civil Case No. 1:09-cv-00894 (CKK)

**ONE OR MORE UNKNOWN PARTIES
MISREPRESENTING THEIR AFFILIATION
WITH THE MAKING HOME
AFFORDABLE PROGRAM,**

Defendants.

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
ITS EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER WITH
LIMITED EXPEDITED DISCOVERY, AND OTHER EQUITABLE RELIEF AND
ORDER FOR DEFENDANTS TO SHOW CAUSE WHY A PRELIMINARY
INJUNCTION SHOULD NOT ISSUE**

Table of Contents

I. INTRODUCTION 1

II. FACTS 2

 A. The Parties 2

 1. The Federal Trade Commission 2

 2. The Defendant(s) 2

 B. The Making Home Affordable Program 3

 C. Defendants’ Business Practices 5

III. LEGAL ARGUMENT 10

 A. This Court Has The Authority To Grant The Requested Relief 10

 B. The FTC Meets The Standard For Granting A Government Agency’s Request For
 A Temporary Restraining Order And Preliminary Injunction 13

 1. The FTC Has Demonstrated Its Likelihood To Succeed On The Merits
 14

 2. The Equities Weigh In Favor Of Granting Injunctive Relief 19

 C. Defendants Should be Barred from Placing Sponsored Links that Imply a
 Governmental Affiliation or Routing Consumers to Any Website Offering
 Financial Services 21

 D. Expedited Discovery Is Necessary 22

III. CONCLUSION 24

Table of Authorities

Cases

Beneficial Corp. v. FTC,
542 F.2d 611, 617 (3d Cir. 1976) Page 16

Bennett v. FTC,
200 F.2d 362, 363 (D.C. Cir. 1952) Page 18

Busch v. Buchman, Buchman & O’Brien Law Firm,
11 F.3d 1255, 1258 (5th Cir. 1994) Page 12

CFTC v. British American Commodity Options Corp.,
560 F.2d 135, 143 (2d Cir. 1977) Page 19

CFTC v. Hunt,
591 F.2d 1211, 1220 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979) Page 20

Exposition Press, Inc. v. FTC,
295 F.2d 869, 873 (2d Cir. 1961) Page 18

Fleet v. United States Consumer Counsel, Inc.,
95 B.R. 319, 334 (Bankr. E.D.Pa. 1988) Page 19

* *FTC v. Affordable Media, LLC*,
179 F.3d 1228, 1233 (9th Cir. 1999) Pages 14, 19-21

FTC v. Am. Home Prods., Corp.,
695 F.2d 681, 687 (3d Cir. 1982) Page 16

* *FTC v. Amy Travel Service, Inc.*,
875 F.2d 564, 571-72 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989) Pages 10, 11,14, 20 ,21

FTC v. Beatrice Foods Co.,
587 F.2d 1225, 1229 (D.C. Cir. 1978) Page 14

FTC v. Cyberspace.com,
453 F.3d 1196, 1200 (9th Cir. 2006) Page 17

FTC v. Federal Loan Modification Law Center, LLP,
Case No. SAVC09-401-CJC (C.D. Cal. filed Apr. 22, 2009) Page 8

FTC v. Figgie Int'l, Inc.,
994 F.2d 595, 605 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) Page 15

* *FTC v. Five-Star Auto Club*,
97 F. Supp. 2d 502, 526 (S.D.N.Y. 2000) Pages 15, 20, 21

* *FTC v. Gem Merchandising Corp.*,
87 F.3d 466, 468 (11th Cir. 1996) Pages 2, 10, 11, 20, 21

FTC v. Global Web Solutions, Inc.,
Civil Action No. 03-2031-HHK (D.D.C. Oct. 3, 2003) Pages 11, 19

FTC v. H.N. Singer, Inc.,
668 F.2d 1107, 1111 (9th Cir. 1982) Pages 10, 11

FTC v. Hope Now Modifications, LLC,
Civ. No. 1:09-cv-1204-JBS (D.N.J. filed Mar. 17, 2009) Page 8

FTC v. New Hope Property LLC,
Civ. No. 1:09-cv-1203-JBS (D.N.J. filed Mar. 17, 2009) Page 8

* *FTC v. One or More Unknown Parties Deceiving Consumers Into Seeking Home Loan
Modification Through <http://bailout.hud-gov.us> and <http://bailout.dohgov.us> (docket later
amended to *FTC v. Ryan*), Civil Action No. 1:09-535-HHK (D.D.C. Mar. 20, 2009)
. Pages 11, 17, 18, 23*

* *FTC v. One or More Unknown Parties Doing Business as the Institute for International
Licensing (docket later amended to *FTC v. Mountain View Systems*), Civil Action No. 03-
0021-RMC (D.D.C. Jan. 9, 2003) Page 11*

FTC v. Pantron I Corp.,
33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied* 514 U.S. 1083 (1995) Page 15

FTC v. Pharmtech Research, Inc.,
576 F. Supp. 294, 298 (D.D.C. 1983) Page 2

FTC v. Publishing Clearing House, Inc.,
104 F.3d 1168, 1170 (9th Cir. 1997) Pages 20, 21

FTC v. R.A. Walker & Associates, Inc.,
37 B.R. 608, 609 n.2 (D.D.C. 1983) Page 11

FTC v. Security Rare Coin & Bullion Corp.,
931 F.2d 1312, 1314-15 (8th Cir. 1991) Page 11

FTC v. SlimAmerica, Inc.,
77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999) Pages 14, 20, 21

FTC v. Thomsen-King & Co.,
109 F.2d 516, 519 (7th Cir. 1940) Page 19

FTC v. U.S. Oil & Gas Corp.,
748 F.2d 1431, 1434 (11th Cir. 1984) Pages 10, 11

FTC v. Wilcox,
926 F. Supp. 1091, 1098 (S.D. Fla. 1995) Page 15

* *FTC v. World Travel Vacation Brokers, Inc.*,
861 F.2d 1020, 1028 (7th Cir. 1988) Pages 10, 14, 15, 19

FTC v. World Wide Factors, Ltd.,
882 F.2d 344, 346-47 (9th Cir. 1989) Pages 11, 14, 20

GTE New Media Serv., Inc. v. Bellsouth Corp.,
199 F.3d 1343, 1350-51 (D.C. Cir. 2000) Page 13

In re Thompson Medical Co.,
104 F.T.C. 648, 788-89 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479
U.S. 1086 (1987) Pages 15, 17

International Shoe Corp. v. Washington,
326 U.S. 310 (1945) Page 12

Kraft, Inc. v. FTC,
970 F.2d 311, 314 (7th Cir. 1992), *cert. denied* 507 U.S. 909 (1993) Pages 15, 16

National Soc’y of Prof. Eng’rs. v. United States,
435 U.S. 679, 697 (1978). Page 20

PerfumeBay.com, Inc. v. eBay, Inc.,
506 F.3d 1165, 1169-70, 77-78 (9th Cir. 2007) Page 9

Pinker v. Roche Holdings,
292 F.3d 361, 369 (3d Cir. 2002) Page 12

Removatron Int’l Corp. v. FTC,
884 F.2d 1489, 1495 (1st Cir. 1989) Pages 15, 17

Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,
119 F.3d 935, 946-47 (11th Cir. 1997) Page 12

SEC v. Certain Unknown Purchasers of the Common Stock of Santa Fe International Corp.,
 817 F.2d 1018 (2d Cir. 1987) Page 23

SEC v. Euro Security Fund,
 1999 U.S. Dist. LEXIS 182598 (S.D.N.Y. Apr. 2, 1999) Page 23

SEC v. General Refractories Co.,
 400 F. Supp. 1248, 1254 (D.D.C. 1975) Page 14

SEC v. Management Dynamics, Inc.,
 515 F.2d 801, 808 (2d Cir. 1975) Page 13

SEC v. R.J. Allen & Assoc., Inc.,
 386 F. Supp. 866, 877 (S.D. Fla. 1974) Page 20

SEC v. Stratton Oakmont, Inc.,
 878 F. Supp. 250, 255 (D.D.C. 1995) Page 14

Slough v. FTC,
 396 F.2d 870 (5th Cir. 1968), *cert denied*, 393 U.S. 980 (1968) Page 18

Southwest Sunsites v. FTC,
 785 F.2d 1431, 1435 (9th Cir.1986) Page 15

Standard Educators, Inc. v. FTC,
 475 F.2d 401, 403 (D.C. Cir.), *cert. denied*, 414 U.S. 828 (1973) Page 21

United Liberty Life Ins. Co. v. Ryan,
 985 F.2d 1320, 1330 (6th Cir. 1993) Page 12

United States Ass’n of Credit Bureaus, Inc. v. FTC,
 299 F.2d 220 (7th Cir. 1962) Page 18

United States Navy Weekly, Inc. v. FTC,
 207 F.2d 17 (D.C. Cir. 1953) Page 18

United States v. Diapulse Corp. of Am.,
 457 F.2d 25, 29 (2d Cir. 1972) Page 19

Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.,
 559 F.2d 841, 843 (D.C. Cir. 1977) Page 13

Statutes

15 U.S.C. § 22 Page 13

15 U.S.C. § 41 Page 2

* 15 U.S.C. § 45(a) Pages 2, 14, 15

* 15 U.S.C. § 53(b) Pages 1, 2, 10, 12-15

28 U.S.C. § 1391(b)(2) Page 13

Other Authorities

Making Home Affordable: Updated Detailed Program Description,
http://www.treas.gov/press/releases/reports/housing_fact_sheet.pdf Page 3

Administration Launches New Consumer Website For Responsible Homeowners Seeking Relief: MakingHomeAffordable.gov Features Self Assessment Tools, Calculators to Help Borrowers Determine Eligibility, Payment Reductions under Administration's Refinancing and Loan Modification Program,
<http://www.treas.gov/press/releases/tg63.htm> Page 4

Federal and State Enforcers Crack Down on Mortgage Modification and Foreclosure Relief Scams, <http://www2.ftc.gov/opa/2009/04/hud.shtm>. Page 8

Homeowner Affordability and Stability Plan Executive Summary,
United States Department of the Treasury,
<http://www.treasury.gov/press/releases/tg33.htm> Page 3

Obama Administration Announces New Details on Making Home Affordable Program,
http://www.makinghomeaffordable.gov/pr_042809.html Page 5

S. Rep. No. 130, 103rd Cong., 2d Sess. 15-16, reprinted in 1994 U.S. Code Cong. & Admin. News 1776, 1790-91. Page 10

I. INTRODUCTION

Plaintiff, the Federal Trade Commission (“FTC”), pursuant to Sections 5 and 13(b) of the Federal Trade Commission Act, brings this action to a halt a deceptive practice that is diverting consumers searching for the Making Home Affordable program sponsored by the United States government to websites offering paid loan modification services.

Defendants pay search engines to deliver their advertisements on search results pages when consumers type “making home affordable” into a search window. Defendants’ advertisements, sometimes called “sponsored links” or “sponsored results,” include a header/hyperlink that reads “MakingHomeAffordable.gov.” or slight variations on that domain name. Clicking on this link does not deliver www.makinghomeaffordable.gov, the official website for the Making Home Affordable program. Instead, it delivers one of several different web pages that promise to help modify home loans or prevent foreclosure. These websites collect consumers’ personal and financial information either for their own marketing use or for sale to entities offering paid loan modification services. At the time of the filing of this action, Defendants’ identities were unknown to the FTC.

To immediately halt Defendants’ illegal practices, and obtain the evidence necessary to identify Defendants and determine the scope and variety of their misrepresentation of affiliation with the United States government, Plaintiff Federal Trade Commission (“FTC”) seeks, under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), issuance of a temporary restraining order (“TRO”) with an order to show cause why a preliminary injunction should not issue. The proposed TRO would enjoin Defendants’ illegal conduct and require operators of the Internet search engines that carried Defendants’ advertisements to provide information concerning Defendants’ identities and the advertisements that have appeared on the search engine’s results

web pages. This relief is necessary to prevent continued harm to consumers and the destruction of evidence, to identify Defendants, and thereby to preserve the Court's ability to provide effective final relief.

II. FACTS

A. The Parties

1. The Federal Trade Commission

Plaintiff Federal Trade Commission is an independent agency of the United States created by the FTC Act, 15 U.S.C. § 41 *et seq.* The FTC enforces, among other statutory provisions, Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. As described in detail below, Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC, through its own attorneys, to initiate United States District Court proceedings in proper cases to seek permanent relief to enjoin violations of the FTC Act and to secure such equitable relief as may be appropriate in each case, including consumer redress. *See, e.g., FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *FTC v. Pharmtech Research, Inc.*, 576 F. Supp. 294, 298 (D.D.C. 1983).

2. The Defendant(s)

Defendant(s) are one or more individuals or entities who since April 28, 2009:

(a) caused paid advertisements that contain a title or hyperlink labeled [MakingHomeAffordable.gov](#) or similar terms to be placed on Internet search results pages when consumers search for "making home affordable" or similar terms; and (b) caused the Internet browsers of consumers who clicked on or otherwise activated such hyperlinks to request web pages from websites other than the official United States government website,

<http://www.makinghomeaffordable.gov>. Defendants' identities and addresses are unknown to the Commission at this time.¹ The Defendants transact business in the District of Columbia.

B. The Making Home Affordable Program

The deep contraction in the economy and in the housing market created devastating consequences for homeowners and communities throughout the country. On February 18, 2009, President Barack Obama announced a plan to help as many as 7 to 9 million responsible homeowners restructure or refinance the first mortgages on their homes to avoid foreclosure.² On March 4, 2009, the United States Treasury Department released guidelines for this plan, called the Making Home Affordable program, to incentivize mortgage servicers to refinance or modify eligible mortgages.³

On March 19, 2009, the United States Department of the Treasury and the Department of Housing and Urban Development (“HUD”) launched the website www.MakingHomeAffordable.gov to provide consumers with information about the Obama Administration's Making Home Affordable loan modification and refinancing program, including interactive self-assessment tools to empower borrowers to determine if they are

¹ Because the number of Defendants is unknown, through the remainder of the brief the Commission refers to them as “Defendants.”

² Press Release, *Homeowner Affordability and Stability Plan Executive Summary*, United States Department of the Treasury, <http://www.treasury.gov/press/releases/tg33.htm>.

³ U.S. Treasury, *Making Home Affordable: Updated Detailed Program Description*, http://www.treas.gov/press/releases/reports/housing_fact_sheet.pdf

eligible to participate and to calculate the monthly mortgage payment reductions they would stand to realize under the program.⁴

The Cabinet Secretaries of both Departments emphasized the importance of this new website to deliver relief to responsible borrowers, stabilize the housing market and to help the United States economy recover:

"Education and outreach is central to the success of our Making Home Affordable program," said Treasury Secretary Tim Geithner. "Putting resources and tools directly in the hands of homeowners will expedite the process of delivering relief to responsible borrowers, and stabilizing the housing market is central to our overall economic recovery."

"The tools offered on this site will help American families access the help they need even faster," said HUD Secretary Shaun Donovan. "Communicating how this program works and who is eligible to those who need it is critical to the program's success, and this website does just that."⁵

On April 28, 2009, the United States government expanded the Making Home Affordable program to include relief from second mortgages for struggling homeowners and to provide consumers with direct advice from Treasury and HUD staff through MakingHomeAffordable.gov:

Continuing to bolster its outreach around the program, the Administration also announced today a new effort to engage directly with homeowners via MakingHomeAffordable.gov. Starting today, homeowners will have the ability to submit individual questions through the website to the Administration's housing team. Members of the Treasury and HUD staffs will periodically select commonly asked questions and post responses on MakingHomeAffordable.gov. To submit a question, homeowners can visit

⁴ Press Release, *Administration Launches New Consumer Website For Responsible Homeowners Seeking Relief: MakingHomeAffordable.gov Features Self Assessment Tools, Calculators to Help Borrowers Determine Eligibility, Payment Reductions under Administration's Refinancing and Loan Modification Program*, <http://www.treas.gov/press/releases/tg63.htm>.

⁵ *Id.*

www.MakingHomeAffordable.gov/feedback.html. Selected questions from homeowners across the country and responses from the Administration will be available at www.MakingHomeAffordable.gov/asked-and-answered.html.⁶

As the history of the development of the website www.makinghomeaffordable.com indicates, the Treasury Department and the Department of Housing and Urban Development (“HUD”) have made makinghomeaffordable.gov the primary source of information about the Making Home Affordable program. The site helps consumers determine if they are eligible for the refinancing or loan modification program, determine whether their mortgage servicer is participating in the program, prepare the information that will be needed by their lender, and locate free HUD-approved housing counselors to help them with the process.⁷

C. Defendants’ Business Practices

On April 29, 2009, the FTC learned of Defendants’ marketing practices to divert consumers from www.makinghomeaffordable.gov to commercial websites. On the same day, an FTC paralegal visited several Internet search engines and entered the phrase "making home affordable" into the search window of each. He received search results pages from four search websites, www.msn.com, www.yahoo.com, www.altavista.com, and www.alltheweb.com, that included sponsored links consisting of a hyperlink labeled MakingHomeAffordable.gov, including:

MakingHomeAffordable.gov - makinghomeaffordable.gov Sponsored sites
Making Your Home Affordable. Let Us Fight For You And Save Your **Home**.

⁶ Press Release, *Obama Administration Announces New Details on Making Home Affordable Program*, http://www.makinghomeaffordable.gov/pr_042809.html.

⁷ The web page headed “Find a counselor” provides both a link to HUD-approved housing counselors and the toll-free number of the HOPE NOW Alliance, 1-888-995-HOPE (4673). *Find A Counselor*, <http://www.makinghomeaffordable.gov/counselor.html>.

Makinghomeaffordable.gov

Making Your Home Affordable. Let Us Fight For You And Save Your **Home**.
www.howcanistopaforeclosure.com

These advertisements were presented at the top or near the top of the search engine results, with a designation of "sponsored results" or "sponsored sites" and/or a shaded background. (PX01 at 1-3 ¶¶ 4-9, Att. A-F at 4-25.)

The FTC paralegal then clicked on the heading/hyperlink "MakingHomeAffordable.gov" on these search results. He clicked on the link on each search result web page multiple times and a rotating series of four websites appeared, all of which purport to offer mortgage loan modification services:⁸

- ▶ “Loan Modification Help Now” at www.loanmodificationhelpnow.com
- ▶ “National Relief” at www.mortgage-payment-help.com
- ▶ “Loan Modification 321” at www.howcanistopaforeclosure.com
- ▶ “Loan Modification Connection” at www.loanmodificationconnection.com

(*Id.* at 3-4 ¶¶ 10-14, Att. G-J at 26-37.)

On April 30 and May 6, 2009, he repeated the web searches using the same phrase, “making home affordable.” As a result of these searches, he received search results pages that included advertisements similar or identical to the earlier results, including the following:

Making Home Affordable.gov

Make your **home affordable**. Let us fight for you and save your **home**.
www.makinghomeaffordable.gov

⁸ He right-clicked when his mouse was over a link and selected the option of opening the page in a new browser window, which preserved the original search results page so that he could return to it and click on the link multiple times. After four different pages appeared from four clicks on the same link, the rotation of web pages repeated for the fifth through eighth clicks.

MakingHomeAffordable.gov -

Sitios patrocinados

www.howcanistopaforeclosure.com

Making Your Home Affordable. Let Us Fight For You And Save Your **Home**.

(*Id.* at 4-5 ¶¶ 16, 17, Att. K-L at 39-49.) He then clicked on each link multiple times as he had done on April 29, 2009. On both April 30 and May 6, 2009, he was directed to two of the same websites as before, National Relief and Loan Modification 321. (*Id.* at 5 ¶¶ 16, 18.) On May 6 he was also directed to two new websites:

- ▶ Start a Loan Mod at www.startloanmod.com
- ▶ Home+Rescue Center at www.homerescuecenter.net

(*Id.* at 5-6 ¶¶ 16-20, Att. M, N at 50-55.)

All six websites delivered through Defendants' sponsored hyperlinks purport to offer mortgage loan modification or foreclosure relief services. They make the following claims, among others:

- ▶ Loan Modification Help Now says “**There are Ways to Avoid Foreclosure! We can help you find a solution.**” (*Id.* at 27-28.)
- ▶ National Relief says “Act Quickly The Number of Loans to be Modified is Limited” and offers a “FREE Consultation, a \$500 value.” (*Id.* at 30-31.)
- ▶ Loan Modification 321 says “Behind on your Mortgage? Don’t let them take your home without a fight. **HELP IS ON THE WAY!**” (*Id.* at 32-33.)
- ▶ Loan Modification Connection says “**Loan Modification May Save your Home!**” (*Id.* at 35-36.)

- ▶ Home+Rescue Center says “We can help: Stop Foreclosure, Reduce Loan Balance, Transfer Overdue Payments, [and] Lower Monthly Payments. **We Can Save Your Home!**” (*Id.* at 54-55.)
- ▶ Start a Loan Mod says “**Get Your FREE Loan Modification Consultation Today!**” and “Our Network of Experts Can Help You Stay In Your Home. . . . In many instances we are able to negotiate a lower loan amount for the homeowner.” (*Id.* at 51-52.)

All six websites require that consumers enter their name, telephone number, email address, loan balance and delinquency status before obtaining assistance, but fail to tell consumers the costs or terms of this assistance.⁹ (*Id.* 27-36, 51-55). Five of the sites promise to “match you with loan modification specialists based on your situation,” (*Id.* at 27, 33, 36) or provide “a network of experts [to] help you stay in your home.” (*Id.* at 51, 55.)

⁹ In the wake of government efforts to promote its mortgage relief plan, for-profit marketers touting their ability to obtain mortgage relief have proliferated. In recent months, the Commission has taken action against mortgage relief marketers and their principals alleging that they falsely promise they would obtain loan modification or foreclosure relief for borrowers in distress in violation of Section 5. See Press Release, *Federal and State Enforcers Crack Down on Mortgage Modification and Foreclosure Relief Scams*, Federal Trade Commission, <http://www2.ftc.gov/opa/2009/04/hud.shtm>.

In these cases, the defendants require substantial upfront fees before providing the purported services, often equal to one-month’s mortgage payment. The Commission alleged in these cases that, despite consumers paying these substantial fees, the defendants failed to obtain the promised loan modification or foreclosure relief. *FTC v. Federal Loan Modification Law Center, LLP*, Case No. SAVC09-401-CJC (C.D. Cal. filed Apr. 22, 2009); *FTC v New Hope Property LLC*, Civ. No. 1:09-cv-1203-JBS (D.N.J. filed Mar. 17, 2009); *FTC v Hope Now Modifications, LLC*, Civ. No. 1:09-cv-1204-JBS (D.N.J. filed Mar. 17, 2009). Notably, the relief obtained by the Commission in one of these cases included a preliminary injunction prohibiting the defendants from obtaining upfront fees from consumers. *FTC v. Federal Loan Modification Law Center, LLP*, Case No. SAVC09-401-CJC (C.D. Cal. filed Apr. 22, 2009)(preliminary injunction available at <http://www2.ftc.gov/os/caselist/0923070/090424fedloanpi.pdf>).

It appears that Defendants are affiliates of one or more affiliate programs that deliver potential customers to these six websites.¹⁰ Several of the web pages recorded by the FTC include footers that show codes that may identify the affiliate who is delivering a potential customer to the website, including “AFID=53697” and “sub_id=CD8928.” (*Id.* at 30, 33.) Also, Defendants deliver consumers from one sponsored link to different websites on a rotating basis and the websites in this rotation appear to be run by different companies. Three of the sites that the sponsored links deliver, Loan Modification Help Now, Loan Modification 321, and Loan Modification Connection (*Id.* at 27-28, 32-33, 35-36) are similar in format and refer to “Wisdom” in their disclaimers. The use of “Wisdom” appears to refer to the Wisdom Companies, LLC, a California limited liability company that sells leads that it obtains through several methods, including “search engines” and “affiliate relationships.”¹¹ However, the other three websites that have been delivered on a rotating basis do not contain the same disclaimers as the Wisdom company sites, are dissimilar to their format, and appear to be operated by one or more other persons. (PX01 at 27-28, 32-33, 35-36). As a result, Defendants likely are receiving compensation from two or more groups of websites.

¹⁰ Marketing affiliates contract with a website, either directly or through an affiliate program, to deliver customers to the website and be paid by the website’s operators. When an affiliate directs a consumer to a website, he or she must transmit some information that identifies the affiliate who should be paid for the referral. This information is typically coded into the URL that is sent to the website. As a part of the URL, it sometimes appears in the website name when the web page is printed.

The use of marketing affiliates to place sponsored link advertisements on search results is discussed in *PerfumeBay.com, Inc. v. eBay, Inc.*, 506 F.3d 1165, 1169-70, 77-78 (9th Cir. 2007), a Lanham Act case where eBay obtained reversal of a finding that it acted with unclean hands because there was insufficient evidence that it controlled its affiliates’ use of sponsored links that directed customers to eBay.

¹¹*See About Us*, available at www.loanmodificationleads.com/about/.

III. LEGAL ARGUMENT

A. This Court Has The Authority To Grant The Requested Relief

This Court has the authority to grant preliminary and permanent relief pursuant to the second proviso of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which states that “in proper cases the FTC may seek, and, after proper proof, the court may issue, a permanent injunction” against violations of “any provision of law enforced by the Federal Trade Commission.” 15 U.S.C. § 53(b).¹² A case involving fraudulent representations, such as this one, qualifies as a “proper case” under Section 13(b). *See, e.g., FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982).¹³

Section 13(b) confers full equitable powers on this Court. In addition to entering a permanent injunction, the Court may order the rescission of contracts, restitution, and/or disgorgement of ill-gotten gains. *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468-70 (11th

¹²This action is not brought pursuant to the first proviso of Section 13(b), which addresses the circumstances under which the FTC can seek preliminary injunctive relief before or during the pendency of an administrative proceeding. Because the FTC brings this case pursuant to the second proviso of Section 13(b), its complaint is not subject to the procedural and notice requirements in the first proviso. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) (Congress did not limit the court’s powers under the [second and] final proviso of § 13(b) and as a result this Court’s inherent equitable powers may be employed to issue a preliminary injunction, including a freeze of assets, during the pendency of an action for permanent injunctive relief); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (holding that routine fraud cases may be brought under second proviso, without being conditioned on first proviso requirement that the FTC institute an administrative proceeding).

¹³A “proper case” includes any matter involving a violation of a law that the FTC enforces. *E.g., Singer*, 668 F.2d at 1113; *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 571-72 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989). In fact, Congress observed that Section 13 “authorizes the FTC to file suit to enjoin any violations of the FTC [sic]. The FTC can go into court *ex parte* to obtain an order freezing assets, and is also able to obtain consumer redress.” S. Rep. No. 130, 103rd Cong., 2d Sess. 15-16, reprinted in 1994 U.S. Code Cong. & Admin. News 1776, 1790-91.

Cir. 1996); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). All preliminary equitable remedies are also available to the Court, including a preliminary injunction with an asset freeze and other ancillary relief. *Gem Merchandising*, 87 F.3d at 469; *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984); *see also FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346-47 (9th Cir. 1989); *Singer*, 668 F.2d at 1111-13; *FTC v. R.A. Walker & Associates, Inc.*, 37 B.R. 608, 609 n.2 (D.D.C. 1983) (Court denying motion of debtor-defendants to modify previously issued TRO imposing asset freeze); *FTC v. Global Web Solutions, Inc.*, Civil Action No. 03-2031-HHK (D.D.C. Oct. 3, 2003) (ex parte Temporary Restraining Order against diversity Visa operation). When, as here, the public interest is implicated, this Court's equitable powers "assume an even broader and more flexible character than when only a private controversy is at stake." *Gem Merchandising*, 87 F.3d at 469 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

On at least two prior occasions, this court has entered temporary restraining orders against unknown persons. *FTC v. One or More Unknown Parties Deceiving Consumers Into Seeking Home Loan Modification Through <http://bailout.hud-gov.us> and <http://bailout.dohgov.us>* (docket later amended to *FTC v. Ryan*), Civil Action No. 1:09-535-HHK (D.D.C. Mar. 20, 2009)(Temporary Restraining Order, including expedited discovery and order to third parties to temporarily disable defendant's web sites and suspend defendant's Internet domain name registrations); *FTC v. One or More Unknown Parties Doing Business as the Institute for International Licensing* (docket later amended to *FTC v. Mountain View Systems*), Civil Action No. 03-0021-RMC (D.D.C. Jan. 9, 2003) (*ex parte* Temporary

Restraining Order, including expedited discovery, asset freeze, and restrictions on web site registrations).

In addition, this Court has personal jurisdiction over the Defendants, and venue is proper in the District of Columbia. As discussed above, Defendants hold themselves out as affiliated with two Departments of the United States government headquartered in the District of Columbia by purporting to deliver consumers to an official United States government website. In general, a court will find that the exercise of personal jurisdiction over a non-resident defendant comports with due process when the defendant has purposefully established minimum contacts with the forum and the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice. *International Shoe Corp. v. Washington*, 326 U.S. 310 (1945).

Where, as here, a federal statute authorizes nationwide or worldwide service of process,¹⁴ a court's exercise of jurisdiction over non-resident defendants depends on the existence of minimum contacts with the United States as a whole, and not the defendant's contacts with the specific forum. *See, e.g., Pinker v. Roche Holdings*, 292 F.3d 361, 369 (3d Cir. 2002); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 946-47 (11th Cir. 1997); *Busch v. Buchman, Buchman & O'Brien Law Firm*, 11 F.3d 1255, 1258 (5th Cir. 1994); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993). Further, venue is appropriate in actions brought pursuant to Section 13(b) of the FTC Act in any district where a defendant

¹⁴Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), states: "In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found."

“transacts business” or wherever venue is proper under section 1391 of title 28.” 15 U.S.C. § 53(b).¹⁵

Venue is proper under 28 U.S.C. § 1391(b)(2) where “a substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b)(2). Here, the Commission’s claim is premised on Defendants’ representations that clicking on their advertisements will bring consumers to an official website of the Treasury Department and HUD. Accordingly, a substantial part of the events pertaining to the Commission’s claim occurred in the District of Columbia, where the Treasury Department and HUD are headquartered.

B. The FTC Meets The Standard For Granting A Government Agency’s Request For A Temporary Restraining Order And Preliminary Injunction

Because the FTC acts as “a statutory guardian charged with safeguarding the public interest,” the standard for preliminary injunctive relief under Section 13(b) differs from that typically applied to private litigants. *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). Although courts in this circuit ordinarily follow a four-part test in considering the propriety of preliminary injunctive relief, see *Washington Metropolitan Area Transit*

¹⁵The D.C. Circuit’s ruling in *GTE New Media Serv., Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1350-51 (D.C. Cir. 2000), does not limit this analysis. In *GTE*, the D.C. Circuit held that Section 12 of the Clayton Act, 15 U.S.C. § 22, which contains a provision authorizing worldwide service of process, could only be used in cases in which the Clayton Act’s venue provision was satisfied. The Court reasoned “invocation of the nationwide service clause [of Section 12] rests on satisfying the [Act’s] venue provision.” *GTE*, 199 F.3d at 1350. Here, the venue provision of the FTC Act is broader than that in the Clayton Act. Section 12 of the Clayton Act provides that “Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business. . . .” 15 U.S.C. § 22. By contrast, the FTC Act states that “Any suit may brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28.” 15 U.S.C. 53(b). Also, Defendants engage in practices that directly target the District of Columbia, “unabashedly malignant actions directed at or felt in this forum,” that were not present in *GTE*, 199 F.3d at 1349.

Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977), the standard for a government agency seeking an injunction pursuant to a statute that provides for such relief “is quite different from the common law equity basis for an injunction and no showing of irreparable injury is required.” *SEC v. General Refractories Co.*, 400 F. Supp. 1248, 1254 (D.D.C. 1975); *see also FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (FTC need not show irreparable harm); *SEC v. Stratton Oakmont, Inc.*, 878 F. Supp. 250, 255 (D.D.C. 1995) (noting that government agency may obtain injunction without showing irreparable harm or inadequacy of other remedies).

Specifically, in Section 13(b) actions, courts consider two factors: (1) the likelihood that the FTC ultimately will succeed on the merits; and (2) the balance of the equities at stake. *Affordable Media*, 179 F.3d at 1233; *World Wide Factors*, 882 F.2d at 346; *World Travel Vacation Brokers*, 861 F.2d at 1029. Generally, the FTC “meets its burden on the likelihood of success issue if it shows preliminarily, by affidavit or other proof, that it has a fair and tenable chance of ultimate success on the merits.” *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978). As set forth in this memorandum, the FTC has amply demonstrated that it will ultimately succeed on the merits of its claims and that the balance of equities favors injunctive relief.

1. The FTC Has Demonstrated Its Likelihood To Succeed On The Merits

As described above and evidenced in the exhibits and declarations to this memorandum, the FTC is likely to succeed in establishing that defendants are violating Section 5 of the FTC Act. Section 5 prohibits misrepresentations or omissions of material facts made to induce the purchase of goods or services. *See, e.g., Amy Travel*, 875 F.2d at 573; *FTC v. SlimAmerica, Inc.*,

77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999). An act or practice is deceptive under Section 5(a) if it involves a material representation or omission that is likely to mislead consumers, acting reasonably under the circumstances, to their detriment. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied* 514 U.S. 1083 (1995); *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992), *cert. denied* 507 U.S. 909 (1993); *Southwest Sunsites v. FTC*, 785 F.2d 1431, 1435 (9th Cir.1986). Express and deliberate claims are presumed material.¹⁶ *SlimAmerica*, 77 F. Supp. 2d at 1272; *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995); *In re Thompson Medical Co.*, 104 F.T.C. 648, 788-89 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

The FTC need not prove reliance by each purchaser misled by Defendants. *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1275 (S.D. Fla. 1999). “Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13(b)].” *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) (citations omitted). Rather, a “presumption of actual reliance arises once the FTC has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product.” *Id.* at 605-6; *see also SlimAmerica*, 77 F. Supp. 2d at 1275.

As demonstrated above, Defendants have violated Section 5 of the FTC Act by falsely representing they are the United States government. Specifically, through the use of the makinghomeaffordable sponsored links, Defendants falsely represent that they operate

¹⁶The FTC need not prove that Defendants’ misrepresentations were made with an intent to defraud or deceive or were made in bad faith. *See, e.g., World Travel Vacation Brokers*, 861 F.2d at 1029; *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 526 (S.D.N.Y. 2000).

www.makinghomeaffordable.gov and are a part of or affiliated with the United States government. The headings and active hyperlinks on these sponsored links use the domain name of the official Making Home Affordable program website for the Departments of the Treasury and Housing and Urban Development. Proposed defendants are not affiliated with the federal government and clicking on their misleading hyperlink leads *not* to the official site of the Making Home Affordable program, but instead to websites that solicit sensitive personal and financial information to be used by marketers employed by for-profit mortgage modification services.

These false claims are expressly made through the use of the makinghomeaffordable.gov hyperlink and strongly implied in the subsequent website advertising. *See e.g., Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992) (“implied claims fall on a continuum, ranging from the obvious to the barely discernible.”). In determining whether a particular claim is made, established law directs courts to consider the “overall net impression” of the advertisement. *See FTC v. Am. Home Prods., Corp.*, 695 F.2d 681, 687 (3d Cir. 1982), *citing Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976).

As a matter of law, Defendants’ deceptive representations that they operate the makinghomeaffordable.gov website and that they are affiliated with the United States government are presumed material because they are express (or nearly express) in nature and would affect a consumer’s decision whether they should pay upfront fees to the for-profit marketer of mortgage relief services to which Defendants intentionally divert consumers. These diversionary tactics cause consumers seeking the government website to receive instead marketing made by for-profit websites, not the legitimate information and free housing counseling available to them at the legitimate makinghomeaffordable.gov. One of the websites

delivered to consumers attempt to further the deceptive government affiliation.¹⁷ As a result, consumers may be denied the tools available on the legitimate website to help them determine if they are eligible for the government refinancing or loan modification program, determine whether their mortgage servicer is participating in the program, prepare the information needed by their lender, and locate free HUD-approved housing counselors.

Defendants' deceptive representations are not corrected by adding the name of a mortgage relief website (different from the makinghomeaffordable.gov website) to the "sponsored link" advertising. This website name is not the active hyperlink and is consistently smaller and less prominent than the hyperlink/header "MakingHomeAffordable.gov." The occasional presence of other website addresses fails to offset the net impression of their search result advertisements. Similarly, the "sponsored site" label itself and greyed text block used to highlight the sponsored sites also fail to correct the deceptive representation. It is well-settled that a "solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures." *FTC v. Cyberspace.com*, 453 F.3d 1196, 1200 (9th Cir. 2006). Statements used to qualify otherwise deceptive statements must be sufficiently clear and conspicuous. *See, e.g., In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, n.9 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *See, e.g., Removatron Int. Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) ("Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent

¹⁷ The three complaints in the cases cited in footnote 9, *supra*, alleged that the defendants misrepresented their affiliation with federal government mortgage relief programs. The District Court in those cases entered TROs that prohibited misrepresentations of government affiliation, as did this court in *FTC v. Ryan*, Civil Action No. 1:09-535-HHK (D.D.C. Mar. 20, 2009), the previous case that the FTC filed in this District against unnamed parties.

meaning of the claims and to leave an accurate impression.”). Defendants attempts to qualify their claims fail entirely to negate the deceptive net impression.

Nor does it defeat a finding of deception if, in some cases, consumers perceive that they are not on a United States government website after clicking on Defendant’s misleadingly labeled hyperlink. Advertisements serving as “deceptive door-openers” are actionable under the FTC Act, and should be enjoined. *See Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961) (upholding injunction of initial print advertisement for vanity publisher even though prospective customers who answered the ad immediately received brochures qualifying the royalty claims before they purchased the service).

In numerous other cases, the Commission and the Courts have found representations of government affiliation to be deceptive and therefore to violate the FTC Act. The prior FTC case in this District in which a TRO was entered was against a website that allegedly misrepresented it was the official HUD website. *FTC v. Ryan*, Civil Action No. 1:09-535-HHK (D.D.C. Mar. 20, 2009)(the parties have stipulated to a preliminary injunction). By using the website’s aura of legitimacy, the defendant enticed consumers into providing personal information which defendant then sold as customer leads to marketers of mortgage relief services. *See, e.g., Bennett v. FTC*, 200 F.2d 362, 363 (D.C. Cir. 1952) (use of the combined words “National,” “Service,” and “Bureau” in conjunction with a Washington, DC address is a representation that the business is connected with the United States government); *United States Navy Weekly, Inc. v. FTC*, 207 F.2d 17 (D.C. Cir. 1953) (use of apparently official name for unofficial publication that is privately owned and operated is misleading); *Slough v. FTC*, 396 F.2d 870 (5th Cir. 1968), *cert denied*, 393 U.S. 980 (1968) (use of name “State Credit Control Board” is implied representation that business has some official government status); *United States Ass’n of Credit*

Bureaus, Inc. v. FTC, 299 F.2d 220 (7th Cir. 1962)(use of “United States” in connection with insignia is direct or implied representations that business is connected with or an agency of the U. S. government); *FTC v. Global Web Solutions, Inc.*, Civil Action No. 03-2031-HHK (D.D.C. Oct. 3, 2003) (*ex parte* Temporary Restraining Order against diversity Visa operation, prohibiting, *inter alia*, misrepresentations, “directly or by implication, that any entity is an agency of, or affiliated, associated, acting in partnership, or under contract with, the United States government”); *Fleet v. United States Consumer Counsel, Inc.*, 95 B.R. 319, 334 (Bankr. E.D.Pa. 1988) (the use of the name “United States Consumer Counsel,” together with an American eagle emblem implied an association with a government agency).

2. The Equities Weigh In Favor Of Granting Injunctive Relief

In balancing the equities between the parties, the public equities must be given far greater weight. *Affordable Media*, 179 F.3d at 1236 (“Obviously, the public interest in preserving illicit proceeds . . . for restitution to the victims is great”); *World Travel Vacation Brokers*, 861 F.2d at 1030. Because Defendants “can have no vested interested in a business activity found to be illegal,” *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972) (internal quotations and citations omitted), a balance of equities tips decidedly toward granting the requested relief. *See also CFTC v. British American Commodity Options Corp.*, 560 F.2d 135, 143 (2d Cir. 1977) (quoting *FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940)) (“[a] court of equity is under no duty ‘to protect illegitimate profits or advance business which is conducted illegally’”).

The temporary and preliminary relief sought here would enjoin Defendants’ deceptive use of “makinghomeaffordable.gov” or other advertising that implies a connection to the Making Home Affordable program or other governmental programs. The Treasury Department and the

Department of Housing and Urban Development (“HUD”) have engaged in a substantial public education campaign to publicize www.makinghomeaffordable.gov as the gateway to information about the government’s loan refinancing and modification programs and free housing counseling services. Proposed defendants’ practices dilute and undercut those efforts.

Granting such relief is also necessary because Defendants’ conduct indicates that they will likely continue to deceive the public. *Five-Star Auto Club*, 97 F. Supp. 2d at 536 (“[P]ast illegal conduct is highly suggestive of the likelihood of future violations.”); *SEC v. R.J. Allen & Assoc., Inc.*, 386 F. Supp. 866, 877 (S.D. Fla. 1974) (past misconduct suggests likelihood of future violations); *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979). Absent the relief sought here, Defendants’ illegal conduct will continue unabated, with foreseeable ongoing consumer injury.

In contrast, the private equities in this case are not compelling. Compliance with the law is hardly an unreasonable burden. *See World Wide Factors*, 882 F.2d at 347 (stating “there is no oppressive hardship to Defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment”). Because the injunction will preclude only harmful, illegal behavior, the public equities supporting the proposed injunctive relief outweigh any burden imposed by such relief on Defendants. *See, e.g., National Soc’y of Prof. Eng’rs. v. United States*, 435 U.S. 679, 697 (1978).¹⁸

¹⁸ In addition to any corporate entities, any individuals involved are liable for injunctive and monetary relief for law violations committed. To obtain an injunction against an individual, the FTC must show that the individual either had the authority to control the unlawful activities or participated directly in them. *See FTC v. Affordable Media*, 179 F.3d 1228, 1234 (9th Cir. 1999); *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *Gem Merchandising*, 87 F.3d at 470; *Amy Travel*, 875 F.2d at 573-74; *SlimAmerica*, 77 F. Supp. 2d at 1276; *Five-Star Auto Club*, 97 F. Supp. 2d at 535. In general, an individual’s status as a corporate officer gives rise to a presumption of liability to control a small, closely held

C. Defendants Should be Barred from Placing Sponsored Links that Imply a Governmental Affiliation or Routing Consumers to Any Website Offering Financial Services

The FTC requests a TRO and Preliminary Injunction that restrain Defendants from any advertising that includes the domain name *makinghomeaffordable.gov*, any variation of that domain name,¹⁹ or any domain name that includes “gov.” The TRO would also prohibit Defendants from diverting consumers from *makinghomeaffordable.gov* or any “gov” website, and from misrepresenting that they operate *www.makinghomeaffordable.gov* or are affiliated with the United States government.

corporation. *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir.), *cert. denied*, 414 U.S. 828 (1973). More particularly, assuming the duties of a corporate officer is probative of an individual’s participation or authority. *Amy Travel*, 875 F.2d at 573; *Five-Star Auto Club*, 97 F. Supp. 2d at 538.

An individual may be held liable for monetary redress for corporate practices if the individual had, or should have had, knowledge or awareness of the corporate defendants’ misrepresentations. *Affordable Media*, 179 F.3d at 1231; *Publishing Clearing House*, 104 F.3d at 1170-71; *Gem Merchandising*, 87 F.3d at 470; *Amy Travel*, 875 F.2d at 574; *SlimAmerica*, 77 F. Supp. 2d at 1276; *Five-Star Auto Club*, 97 F. Supp. 2d at 535. This knowledge element, however, need not rise to the level of subjective intent to defraud consumers. *Affordable Media*, 179 F.3d at 1234; *Amy Travel*, 875 F.2d 574. Instead, the FTC need only demonstrate that the individual had actual knowledge or material misrepresentations, reckless indifference to the truth or falsity of such representations, or an awareness of a high probability of fraud coupled with the intentional avoidance of the truth. *Affordable Media*, 179 F.2d at 1234; *Publishing Clearing House*, 104 F.3d at 1170-1171; *Amy Travel*, 875 F.2d at 574; *SlimAmerica*, 77 F. Supp. 2d at 1276; *Five-Star Auto Club*, 97 F. Supp. 2d at 536. Participation in corporate affairs is probative of knowledge. *Affordable Media*, 179 F.3d at 1235; *Amy Travel*, 875 F.2d 564; *Five-Star Auto Club*, 97 F. Supp. 2d at 538.

¹⁹ Including variations through spaces, punctuation or capitalization, or the use of suffices such as “com,” “net,” “org” or “info,” all of which are currently routed to the official .gov website. (PX01 at 6 ¶ 22.)

D. Expedited Discovery Is Necessary

At the time of the filing of this action, the FTC was not able to determine the identity of Defendants because they appear to operate anonymously as marketing “affiliates.” They place ads on search engine websites. The ads do not identify them. When consumers click on these ads, Defendants route the consumer’s browser to a website marketing loan modification services. Defendants do not necessarily own or operate this loan modification website. As a result, Defendant avoid identifying themselves during the process. *See* Plaintiff’s Certificate of Counsel Pursuant to Local Rule 65.1 and Rule 65(b), Fed. R. Civ. P.

Typically, the loan modification website operator pays the affiliate for each lead, and the affiliate pays the search engine operator for each click on their advertisement. As a result, affiliate have a business relationship with both the search engine operators and the loan modification websites that requires record keeping, communication, and financial transactions. The TRO proposed by the FTC would seek to identify Defendants primarily through these two groups: search engine operators who display their advertisements and the operators of the websites marketing loan modification services whose websites receive the consumers referred by Defendants.

The search engine operators are in a unique position to identify Defendants because they should know that the advertisements have a header/hyperlink labeled MakingHomeAffordable.gov and that consumers who click on this link are not referred to the official website of the Making Home Affordable program. As a result, Section II. of the proposed TRO would require that the search engine operators identify Defendants, provide information about Defendants’ advertising placements, and refuse to accept advertisements that include “MakingHomeAffordable.gov” or “gov” on their face. Although the TRO would prohibit

Defendants from making any representation of affiliation with the United States government, the order would not require search engine operators to make this more judgmental assessment.

The ability to use compulsory process through expedited discovery should greatly enhance the ability of the FTC to determine the identity of the currently unknown defendants. Communications and payments made by Defendants to the affiliates may help identify Defendants when combined with information received from the search engine operators. *See, e.g., SEC v. Certain Unknown Purchasers of the Common Stock of Santa Fe International Corp.*, 817 F.2d 1018 (2d Cir. 1987); *SEC v. Euro Security Fund*, 1999 U.S. Dist. LEXIS 182598 (S.D.N.Y. Apr. 2, 1999); *FTC v. One or More Unknown Parties Deceiving Consumers Into Seeking Home Loan Modification Through <http://bailout.hud-gov.us> and <http://bailout.dohgov.us> (docket later amended to *FTC v. Ryan*)*, Civil Action No. 1:09-535-HHK (D.D.C. Mar. 20, 2009). Expedited discovery will permit the FTC to identify all defendants as expeditiously as possible and determine the extent to which Defendants have used misrepresentations of government affiliation to promote their business.

III. CONCLUSION

The Defendants are diverting consumers from the United States governments' central source of information to help homeowners at risk of losing their homes. There is no legitimate justification for their practices. Therefore, the Commission asks this Court to enter a Temporary Restraining Order and then a Preliminary Injunction.

Respectfully submitted,

Dated: May 15, 2009



Lawrence Hodapp, DC Bar #221309
Ronald G. Isaac, DC Bar # 355834
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
202-326-3105 (Hodapp)
202-326-3231 (Isaac)
202-326-3768 (fax)
lhodapp@ftc.gov
risaac@ftc.gov

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION